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No. 02-626

Supreme Court, U.S.
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In The
Supreme Court of the United States

SOUTH FLORIDA WATER MANAGEMENT DISTRICT,

Petitioner,

v.

MICCOSUKEE TRIBE OF INDIANS, *et al.*,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

BRIEF OF *AMICI CURIAE* NATIONAL WILDLIFE FEDERATION, NATURAL RESOURCES DEFENSE COUNCIL, SIERRA CLUB, AMERICAN RIVERS, NATIONAL AUDUBON SOCIETY, NATIONAL PARKS CONSERVATION ASSOCIATION AND WORLD WILDLIFE FUND IN SUPPORT OF RESPONDENTS

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STATEMENT OF INTEREST

National Wildlife Federation, Natural Resources Defense Council, Sierra Club, American Rivers, National Audubon Society, National Parks Conservation Association and World Wildlife Fund all have a long history of involvement in, and expertise concerning, the protection of our Nation's waters and the implementation of the Clean Water Act. Through testimony in Congress, comments and other advocacy in the Executive Branch, and litigation in the courts, they have pursued these interests repeatedly during the three decades since enactment of the seminal 1972 amendments that gave the Act its current structure. All of these organizations have members who use and rely on a wide array of waters throughout our Nation for recreation, scientific study, and protection of their health, safety, property, drinking water, and food supply.[1]

STATEMENT OF THE CASE

At issue is whether the core protections of the Clean Water Act apply to South Florida Water Management District's practice of pumping huge quantities of pollutant-laden stormwater uphill from a collection canal in a developed urban and suburban area, into a natural wetland area in the Everglades. The Act's core objective is to "restore and maintain the chemical, physical, and biological

[1] Pursuant to S. Ct. R. 37.3(a) and 37.6, the undersigned represent that (1) all parties consented to the filing of this brief, (2) no counsel for any party authored this brief in whole or in part, and (3) no person or entity other than the above-named amici curiae and their counsel made a monetary contribution to the preparation or submission of this brief.

integrity of the Nation's waters," § 101(a), and no one denies the substantial adverse effect that the river-sized flow of phosphorus-laden stormwater pumped by petitioner is having on the water quality and ecosystem of the precious Everglades. Instead, the dispute is whether the Act's central safeguard – its point source permitting program – encompasses that pumping.

As we show below, S-9's pumping plainly amounts to the "discharge of any pollutant" triggering point source requirements. Indeed, the highly manipulated activities at issue here bear no resemblance to the surface runoff that the United States cites (at 5 n.1) as the "textbook examples" of *non*point pollution.

Petitioner and the United States seek to avoid point source requirements on the ground that the polluted stormwater canal from which the pumped water is drawn itself constitutes a water covered by the Act – and that moving pollutants from one covered water (the canal) to another (the Everglades) does not constitute a discharge of those pollutants. This argument is textually untenable, as we show below. Moreover, by allowing the unpermitted diversion of polluted water from any covered waterbody to any other, the argument would open the door to major degradation of less polluted waterbodies by more polluted ones. Such an approach cannot be reconciled either with the Act's core objective of restoring and maintaining the integrity of covered waters, or with its provision for water quality standards designed to protect "the specific uses and attributes *of a particular body of water*." *PUD No. 1 v. Washington Dept. of Ecology*, 511 U.S. 700, 717 (1994).

SUMMARY OF ARGUMENT

Petitioner and the United States pay scant attention to the key statutory phrase defining the applicability of the permit requirement: "discharge of any pollutant." Under the plain meaning of the term, informed by usage of that same term in another Clean Water Act provision (§ 401), S-9's pumping plainly qualifies as a "discharge." Moreover, no one disputed below that the phosphorus in the pumped water is a "pollutant."

S-9's pumping also constitutes the "addition of any pollutant to navigable waters from any point source" within the meaning of the Act's definition of "discharge of a pollutant." It is undisputed that the Everglades waters to which S-9 pumps pollutants are "navigable waters" protected by the Act, and that S-9 constitutes a "point source." Petitioner's and the United States' claim that S-9 does not cause an "addition" of pollutants relies on older appellate precedent, ignoring a recent contrary D.C. Circuit decision. That claim is also irreconcilable with § 404 of the Act, which expressly applies the Act's point source permit program to the "discharge of dredged ... material," a practice described by legislative history as "moving spoil material from *one place in the waterway to another, without* the interjection of *new* pollutants." Appellate decisions have consistently held that relocation of dredged material from one place in United States waters to another constitutes an "addition" triggering point source requirements.

There is no merit in petitioner's attempt to invoke a federalism-driven clear statement test like that applied in *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*, 531 U.S. 159 (2001). Because the Everglades wetlands at issue here are concededly "navigable waters" entitled to the Act's protection, application of

the point source requirement to control undisputed adverse water quality impacts to those waters constitutes a legitimate exercise of Congress' power to protect the channels of commerce from injurious uses.

Moreover, Congress built a prominent state role into the Act's point source permit program. Permits are issued by Florida, applying the state's own water quality standards and its judgments about technology-based requirements. The modest degree of accountability built into the program is fully appropriate given the legitimate federal interest in protection of the Everglades and other priceless waters.

ARGUMENT

I. ON THE FACE OF §§ 301(a) AND 402(a), AS ELUCIDATED BY USAGE OF THE TERM "DISCHARGE" IN § 401, S-9'S PUMPING CONSTITUTES THE "DISCHARGE OF ANY POLLUTANT."

The applicability of § 301(a)'s prohibition, and § 402(a)'s NPDES permitting authority, both hinge on whether there has been a "discharge of any pollutant." As we show below, it is indisputable that (1) S-9's pumping constitutes a "discharge," and (2) the phosphorus contained in the pumped water constitutes a "pollutant." Thus, petitioner's position amounts to the implausible claim that a discharge *containing* a pollutant does not constitute the "discharge *of* any pollutant."

A. S-9's Pumping Constitutes a Discharge.

Petitioner and its allies spend virtually all their attention on the *definition* of "discharge of a pollutant,"

§ 502(12), offering various parsings of that definition's terms (such as "addition"). While their analysis of the § 502(12) definition is fundamentally flawed for reasons discussed later in this brief, as an initial matter they err by overlooking the statutory term "discharge" itself.

(1) The Statutory Term "Discharge" Must Be Given Meaning, and That Meaning Should Be Consistent With Usage Elsewhere in the Act.

The flaw in petitioner's approach is demonstrated by the same *SWANCC* decision upon which petitioner itself so prominently relies. There the Court construed "navigable waters," which is defined in § 502(7) as "the waters of the United States, including the territorial seas." However, the Court *rejected* an argument that, given the § 502(7) definition, "the use of the word navigable in the statute does *not* have *any* independent significance." 531 U.S. at 172 (quoting Solicitor) (ellipses and internal quotations omitted). The Court concluded: "We *cannot agree* that Congress' separate definitional use of the phrase 'waters of the United States' constitutes a basis for reading the term 'navigable waters' *out of the statute*." *Id.* (emphasis added).

So here. The operative phrase in both § 301(a) and § 402(a) speaks of "discharge." Under *SWANCC*, that word cannot be read "out of the statute" simply because it is statutorily defined. On the contrary, "discharge" must be given meaning.

Moreover, that meaning should comport with usage elsewhere in the Act. Significantly, § 401(a) requires a state certification for any activity "which may result in any *discharge* into the navigable waters." (Emphasis added). Under

this Court's precedent, the "normal rule of statutory construction" is that "identical words used in different parts of the same act are intended to have the same meaning." *See, e.g., Desert Palace v. Costa*, 123 S. Ct. 2148, 2155 (2003) (citations and internal quotations omitted). As shown below, petitioner's interpretation would give the term "discharge" in §§ 301(a) and 402(a) a meaning dramatically *different* from the one it has in § 401(a).

(2) Both the Plain Meaning of the Term, and Usage of the Same Term in § 401(a), Confirm That S-9's Pumping Constitutes a "Discharge."

The plain meaning of "discharge," and usage of that same term in § 401(a), lead inescapably to the conclusion that S-9's pumping constitutes a "discharge."

Plain meaning. Though indicating that "[d]ictionary definitions provide guidance to the meaning of the statute," Pet. Br. 26, petitioner never applies such a definition to the statutory term "discharge." However, Justice Scalia did so in *PUD No. 1 v. Washington Dept. of Ecology*, 511 U.S. 700 (1994). As noted in the *PUD* majority opinion, it was undisputed that the passage of water through a dam's tailrace constituted a "discharge." *Id.* 711. Justice Scalia dissented on another point, but did not disagree that there was a discharge. To the contrary, he noted that "[t]he term 'discharge' is not defined in the CWA, but its plain and ordinary meaning suggests 'a flowing or issuing out,' or 'something that is emitted.' Webster's Ninth New Collegiate Dictionary 360 (1991)." *Id.* 725. The flowing or issuing out and emitting of water from the proposed Elkhorn Dam in *PUD* met that test, even though the water would not originate in the outside world, but rather would flow from the river upstream of the

dam to the river below it. Similarly, the flow of water and pollutants through S-9, from one United States water (C-11) to another (WCA3), meets that definition as well, and is thus a "discharge."

Section 401(a). *PUD* addressed Clean Water Act § 401, which requires a state certification for any activity "which may result in any *discharge* into the navigable waters." (Emphasis added.) The Court noted: "There is no dispute that petitioners were required to obtain a certification from the State pursuant to § 401. Petitioners concede that, at a minimum, the project will result in two possible *discharges*," including "*the discharge of water at the end of the tailrace* after the water has been used to generate electricity." 511 U.S. at 711 (emphasis added). This conclusion is consistent with lower court precedent finding that flow through dams and other similar facilities constitutes a "discharge" within the meaning of § 401(a). *See, e.g., Alabama Rivers Alliance v. FERC*, 325 F.3d 290 (D.C. Cir. 2003). Under this approach, S-9's pumping of water and pollutants from C-11 to WCA3 clearly constitutes a discharge. As noted above, the "normal rule of statutory construction" is that the term "discharge" in §§ 301(a) and 402(a) should be construed consistently with the same word in § 401(a) – rather than diametrically opposite as petitioner advocates.

B. The Water Pumped Through S-9 Contains "Pollutants."

As the Eleventh Circuit noted, "*[n]o party* disputes that . . . the water released by the [S-9] station *contains pollutants*." Pet. App. 4a-5a (emphasis added). In particular, it contains phosphorus, a common component of "industrial, municipal, and agricultural waste." § 502(6) (defining "pollutant").

Petitioner's half-hearted attempt to retract that concession adds nothing to petitioner's erroneous argument concerning "discharge." Specifically, petitioner argues that, once a substance has been discharged into United States waters, it stops being a "pollutant" and becomes "pollution." Pet. Br. 28. However, given that a "discharge" can occur when water passes from one side of a dam to the other, petitioner's argument is untenable. Because such water is *itself* being "discharged," the phosphorus *contained* in such water constitutes "industrial, municipal, and agricultural waste *discharged into water*" under the definition of "pollutant." § 502(6) (emphasis added).

C. Discharge of Water Containing Pollutants Constitutes the "Discharge of Any Pollutant."

Given that S-9's pumping constitutes a "discharge," and that the discharge contains "pollutants," it is untenable for petitioner to contend that S-9 does not effectuate the "discharge *of* any pollutant." §§ 301(a), 402(a) (emphasis added). Thus, petitioner's attempt to tease that conclusion out of the Act's definition section (specifically, § 502(12), defining "discharge of a pollutant") should be approached with considerable skepticism. As shown below, petitioner's arguments concerning the § 502(12) definition fall short.

II. S-9'S PUMPING FITS WITHIN THE § 502(12) DEFINITION OF "DISCHARGE OF A POLLUTANT."

The Act defines "discharge of a pollutant" to encompass *inter alia* "any addition of any pollutant to navigable waters from any point source." § 502(12). Petitioner's attempts to draw support from this definition are meritless.

A. S-9'S Discharge Constitutes the "Addition" of Pollutants to United States Waters.

Petitioner prominently relies on the definition's use of "addition," claiming that the pollutants contained in S-9's pump water were already present in the C-11 canal and thus are not "add[ed]" to navigable waters by S-9. This argument is meritless.

(1) Circuit Precedent Unanimously Holds That Diversions Between Waterbodies Constitute "Additions."

Decisions of at least four circuits have recognized that diversions constitute "additions." Beyond the Eleventh Circuit decision under review here, and the First and Second Circuit decisions discussed in petitioner's brief,[2] the D.C. Circuit recently held that an "addition" occurs when water flows through a dam.

In *Alabama Rivers*, the D.C. Circuit addressed whether there was a "discharge" requiring certification under § 401(a). The project at issue – modification of a hydroelectric facility – would produce "an increased flow of water, and particularly of low dissolved oxygen (DO) water." 325 F.3d at 296. In construing § 401(a)'s term "discharge," the court "found the definition of 'discharge of a pollutant' and 'discharge of pollutants' instructive as 'the nearest evidence we have of definitional intent by Congress.'" *Id.* 299 n.12 (citation omitted). That definition includes the term "addition." § 502(12).

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[2] *Dubois v. United States Department of Agriculture*, 102 F.3d 1273 (1st Cir. 1996); *Catskill Mountains Chapter v. City of New York*, 273 F.3d 481 (2d Cir. 2001).

Under that standard, the "plain language" of § 401(a)(1) compelled the conclusion that

> Alabama Power's installation and operation of the new turbine generators at its Martin Dam Project is an "activity . . . which may result in any discharge" within the meaning of section 401(a)(1). As discussed above, "the word 'discharge' contemplates the *addition* . . . of a substance or substances" into the navigable waters. Here, the Commission concluded that the replacement turbines would increase the flow of water into the river by approximately 900 cfs. Thus, at the very least, the replacement turbines will release low DO water into the river at an increased rate of 900 cfs. The installation and operation of the replacement turbines is therefore an activity that "may result in any discharge."

Id. 299 (emphasis added; citation omitted).

Though heavily relying on a D.C. Circuit decision issued twenty years *earlier*, *National Wildlife Federation v. Gorsuch*, 693 F.2d 156 (D.C. Cir. 1982), neither petitioner nor the United States have seen fit to alert this Court to that same court's far more recent analysis of the statutory term "addition" in *Alabama Rivers*.[3]

[3] Aside from *Gorsuch*, whose reasoning conflicts with the more recent *Alabama Rivers* decision by the same court, petitioner also relies prominently on *National Wildlife Federation v. Consumers Power Co.*, 862 F.2d 580 (6th Cir. 1988). That decision – which we submit was erroneous – addresses only recirculation of water and pollutants out of and back into a single water body. Moreover, *Appalachian Power Co. v. Train*, 545 F.2d 1351, 1377 (4th Cir. 1976), though it opined (incorrectly) on the term "addition," did so in the context of reviewing effluent regulations defining the proper *terms* of a point source permit – not whether such a permit is required in the first instance.

(2) By Regulating Discharges of "Dredged Material" and "Dredged Spoil," the Act Confirms That Discharges Need Not Come From an Outside Source.

The Act's treatment of "dredged material" and "dredged spoil" confirms the error in petitioner's arguments concerning the term "addition." Those statutory provisions likewise refute the United States' extraordinary argument (at 19) that "[o]nce a pollutant is present in one part of 'the waters of the United States,' its simple conveyance to a different part is not a 'discharge of a pollutant' within the meaning of the Act."

1972 Amendments. Enacted in 1972, § 301(a) prohibits the "discharge of any pollutant," and § 502(6) defines "pollutant" to include "dredged spoil." Likewise enacted in 1972, § 404(a) authorizes the Secretary of the Army to issue permits for the "discharge of *dredged* or fill material." (Emphasis added.) Contrary to petitioner's and the United States' attempt to dismiss their relevance, these two provisions are highly germane to this case, because they are governed by the *same* statutory definition at issue here – specifically, § 502(12), which defines "discharge of a pollutant" as "any *addition* of any pollutant to navigable waters from any point source." (Emphasis added.)

The very nature of dredged spoil and dredged material – as confirmed by longstanding EPA and Corps regulations – is that they *originate in United States waters*. 40 C.F.R. § 232.2 (EPA regulation defines "dredged material" as "material that is excavated or dredged *from waters of the United States*") (emphasis added). *Accord*, 33 C.F.R. § 323.2(c) (Corps regulation). Thus, *any* discharge of dredged material inherently involves *moving* material that

originated in United States waters – not introducing material to those waters from an external source.

Indeed, according to the sponsor of the floor amendment that first proposed assigning the Corps permitting authority over dredged material discharge, such discharge involves "moving spoil material from *one place in the waterway to another*, *without* the interjection of *new* pollutants." 117 Cong. Rec. 38854 (Nov. 2, 1971) (emphasis added) (Sen. Ellender). *Accord*, *id.* 38853 ("The disposal of dredged material does *not* involve the introduction of *new* pollutants; it merely *moves* the material from one location to another.") (emphasis added).

1977 Amendments. The 1977 Amendments further refute petitioner's contention that an addition – and a discharge – occurs only when material is introduced from outside United States waters. Those amendments enacted conditional exemptions for specified kinds of dredged material discharges, § 404(f)(1), but provided that those same discharges are subject to point source requirements for toxics, § 404(f)(1) (citing CWA § 307, 33 U.S.C. § 1317), and must obtain a point source permit where impacts on United States waters would be significant. § 404(f)(2).

Tellingly, among the discharges that are subject to point source requirements in the above-specified circumstances are several that involve relocation of dredged material within the same waterbody. These include, for example, discharges associated with "plowing" and "the maintenance of drainage ditches." § 404(f)(1)(A) and (C).

Moreover, Congress worded § 404(f)(1)(C) narrowly to encompass only the "maintenance," but not the *construction*, of drainage ditches. Thus, Congress confirmed that ditch construction – which involves relocation of dredged material over short distances – lacks even a *conditional*

exemption from permitting.[4] Congress' treatment of ditch construction further refutes petitioner's claim that a discharge occurs only when material is introduced from outside of United States waters.

Finally, the 1977 Amendments added an exemption for agricultural drainage, but limited it to "*minor* drainage." § 404(f)(1)(A) (emphasis added). The drafters explained that "[t]he exemption for minor drainage does not apply to the drainage of swampland or other wetlands." S. Rep. 370, 95th Cong., 1st Sess. 76 (1977).[5] Congress' intent to regulate discharges associated with agricultural drainage activities – which likewise typically involve relocation of dredged material over short distances – offers yet further evidence against petitioner's claim that relocation of pollutants within United States waters involves no discharge at all.

Judicial precedent. A series of appellate decisions extending back two decades has without exception found that a discharge occurs when dredged material is relocated from one place in United States waters to another. Indeed, those decisions have unanimously confirmed that a discharge occurs when dredged material is relocated *within* a single waterbody.

The seminal case of *Avoyelles Sportsmen's League v. Marsh*, 715 F.2d 897 (5th Cir. 1983), held:

> *No one* has urged here that the materials must come from an *external source* in order to constitute a discharge necessitating a § 404 permit, nor

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[4] *Accord*, 123 Cong. Rec. 26712 (August 4, 1977) (Senator Muskie).

[5] *Accord*, 123 Cong. Rec. 26767 (August 4, 1977) (Senator Muskie); *id.* (Senator Dole).

> would we expect them to, since § 404 refers to "dredged" or "fill" material. . . . "[D]redged" material is by definition material that comes *from the water itself*. A requirement that all pollutants must come from outside sources would *effectively remove the dredge-and-fill provision from the statute*.

Id. 924 n.43 (emphasis added).

Relying on this principle, *Avoyelles* and other appellate decisions have found that relocating dredged or fill material within a single waterbody constitutes an "addition." *See, e.g., Avoyelles*, 715 F.2d at 920-26 (relocation of soil and other material within wetland constituted a discharge); *United States v. M.C.C. of Florida*, 772 F.2d 1501, 1505-06 (11th Cir. 1985), *vacated on other grounds*, 481 U.S. 1034 (1987), *discharge analysis reaffirmed on remand*, 848 F.2d 1133 (11th Cir. 1988) (tugboat propellers added dredged material by stirring up sediment that then settled on adjacent seagrass beds);[6] *United States v. Deaton*, 209 F.3d 331 (4th Cir. 2000) (relocation of dredged material from a ditch to the edge of the ditch constituted an "addition"); *United States v. Huebner*, 752 F.2d 1235, 1241-43 (7th Cir. 1985) (§ 404 permit required for use of earthmoving equipment to spread soil around wetlands); *United States v. Brace*, 41 F.3d 117, 127-29 (3d Cir. 1994) (same); *Borden Ranch Partnership v. U.S. Army Corps of*

[6] Petitioner argues unpersuasively that *M.C.C.* is distinguishable because it involved the use of boat propellers to "rip up sediment." Pet. Br. 30 n.4. To the contrary, because the sediment indisputably originated *in United States waters*, *M.C.C.* stands as strong refutation of petitioner's and the United States' argument that a discharge exists only when pollutants are introduced into United States waters from an outside source.

Engineers, 261 F.3d 810 (9th Cir. 2001), *aff'd*, 537 U.S. 999 (2002) (same).

Even the most restrictive appellate decision on the issue agrees that relocation of dredged material within United States waters – indeed, within a single waterbody – can constitute an addition. In *National Mining Assn. v. U.S. Army Corps of Engineers*, 145 F.3d 1399 (D.C. Cir. 1998), the court held that "incidental fallback," which occurs when dredged material is returned "virtually *to the spot* from which it came," *id.* 1403 (emphasis added), does not constitute an "addition." *Id.* 1405. However, the court confirmed that relocation of dredged material to a *different* spot – even within the *same* waterbody – can constitute an "addition" and thus a discharge.

For example, *National Mining* expressly confirmed that it did not intend to question the regulation of "redeposits at some distance from the point of removal." 145 F.3d at 1407 (emphasis added). The amount of relocation the *National Mining* court considered sufficient to trigger § 404 jurisdiction was minimal. *Id.* 1407, 1402 (confirming that the court was not questioning § 404 jurisdiction over "sidecasting," a practice that "involves placing removed soil . . . by the side of an excavated ditch"). Likewise, *National Mining* expressly confirmed that *plowing* – which likewise involves minimal relocation of dredged material – can constitute an "addition." *Id.* 1405.

In short, Congress' express provision for regulation of discharges of "dredged spoil" and "dredged material" stands in strong refutation to petitioner's and the United States' argument that an "addition" occurs only when pollutants are introduced into United States waters from an outside source.

B. S-9 Is a "Point Source."

As the Eleventh Circuit observed, "*[n]o party* disputes that the S-9 pump station and, in particular, the pipes from which water is released constitute a point source." Pet App. 4a-5a (emphasis added). Indeed, no other conclusion is possible given the Act's broad definition of point source as "*any* discernible, confined and discrete conveyance, including but not limited to [*inter alia*] *any* pipe, ditch, channel, tunnel, [or] conduit." § 502(14) (emphasis added).

C. Pollutants Are Added to WCA3 "From" S-9.

Noting § 502(12)'s reference to addition of a pollutant "from" a point source, petitioner argues that pollutants are not being added to WCA3 "from" S-9: "The S-9 pump station is not the starting point, source, or origin of any pollutants. Any pollutants are added to the navigable waters of the C-11 Canal from other sources within the surrounding area or already exist in the environment." Pet. Br. 27 (internal quotations omitted). As the United States correctly points out, however, a point source is by express statutory definition a "conveyance," § 502(14), thus "signif[ying] that a point source itself need *not* generate or be the originating source of the pollutant." U.S. Br. 21 (emphasis added). Petitioner does not and could not deny that Congress intended the NPDES point source program to encompass municipal sewage treatment plants and stormwater systems – both of which convey rather than originate pollutants. U.S. Br. 22 n.6 (citing CWA §§ 301(b)(1)(B) and 402(p)).

III. SECTION 304(f)(2)(F) OFFERS NO BASIS FOR OVERRIDING THE ACT'S SUBSTANTIVE PROVISIONS CONCERNING DISCHARGE OF POLLUTANTS.

Petitioner and the United States rely heavily on § 304(f)(2) in arguing that diversions constitute nonpoint source pollution, rather than the discharge of pollutants. However, § 304(f) on its face is an "information" provision that does not purport to amend the Act's substantive provisions, or to define the terms used therein. Moreover, the word "nonpoint" appears only in § 304(f)(1), *not* in § 304(f)(2) or the prefatory language introducing § 304(f).

Beyond these fundamental objections, petitioner's argument suffers from another fatal flaw. Section 304(f)(2) cannot possibly be construed as a list of exclusively *non*-point source problems, because the listed items include several that plainly involve *point* source discharges. For example, § 304(f)(2)(F) itself references the "the construction of dams, levees, channels, causeways, or flow diversion facilities," which plainly involves point source discharges. *See, e.g., Minnehaha Creek Watershed District v. Hoffman*, 597 F.2d 617, 624-27 (8th Cir. 1979) (construction of dams involved "discharge of dredged or fill material" requiring a permit under § 404); 33 C.F.R. § 323.2(f) (Corps' definition of "discharge of fill material" includes several items enumerated in § 304(f)(2)(F) – specifically, "dams," "levees," and "causeways"). Likewise, other subparagraphs of § 304(f)(2) reference "agricultural ... activities" and "mining activities," which under the express terms of the Act involve point source discharges. *See* §§ 502(14) (definition of "point source" includes "any ... concentrated animal feeding operation"); 301(p) (providing for discharge permits for certain mining-related discharges),

402(l)(2) (exempting certain mining-related discharges from § 402 permit requirements, but only where such discharges "are not contaminated by contact with, or do not come into contact with, any overburden, raw material, intermediate products, finished product, byproduct, or waste products located on the site of such operations.").

Finally, in their focus on the purely informational § 304(f)(2), petitioner and the United States have entirely overlooked a different Clean Water Act provision that expressly addresses the relationship between flow changes and the point source *permit* requirement – and does so in a way that cuts diametrically *against* petitioner's and the United States' proffered interpretation. Enacted in 1977, § 404(f) provides that discharge of dredged or fill material associated with various listed activities is *conditionally* exempt from the § 301(a) discharge prohibition and the § 402(a) and 404(a) permit requirements, § 404(f)(1), but cautions:

> Any discharge of dredged or fill material into the navigable waters incidental to any activity having as its purpose bringing an area of the navigable waters into a use to which it was not previously subject, where *the flow or circulation of navigable waters may be impaired or the reach of such waters be reduced, shall* be required to have a *permit* under this section.

§ 404(f)(2) (emphasis added). This provision expressly recognizes that point source discharges can involve impairment of the flow or circulation of navigable waters, and requires that such discharges *have a point source permit*.

IV. THE RULES OF STATUTORY INTERPRETATION FAVOR THE APPLICABILITY OF THE ACT'S POINT SOURCE PROVISIONS TO S-9.

Petitioner offers three principles of statutory interpretation that allegedly militate against applicability of point source requirements to S-9. All of these arguments are meritless.

A. Applicability of Point Source Requirements to S-9 Is Well Within Congress' Commerce Clause Power Over the Concededly Navigable Waters at Issue Here, and Thus Does Not Implicate Federalism-Driven Clear Statement Principles.

Petitioner (at 34-37) seeks to invoke the federalism-driven "clear statement" test discussed in *SWANCC*. The foregoing discussion shows that the Act's point source provisions clearly apply here, and thus would meet that test. However, consideration of the waters, the activities, and the statutory program at issue here confirms the inapplicability of federalism-driven clear statement principles.

The Waters at Issue. Petitioner's clear statement argument ignores a fundamental difference between *SWANCC* and this case. There, the dispute was whether certain waters – an "abandoned sand and gravel pit" described by the Court as "*non*navigable, isolated, intrastate waters," 531 U.S. at 166, 174 (emphasis added) – were properly subject to point source requirements. That was the context for *SWANCC*'s observation that, "[w]here an administrative interpretation of a statute invokes the *outer limits* of Congress' power, we expect a clear indication that Congress intended that result." *Id.* 172 (emphasis added).

However, *SWANCC* left undisturbed *United States v. Riverside Bayview Homes*, 474 U.S. 121 (1985), which upheld point source jurisdiction over adjacent wetlands. Explaining *Riverside Bayview*, *SWANCC* noted: "It was the *significant nexus* between the wetlands and 'navigable waters' that informed our reading of the CWA in *Riverside Bayview Homes*." 531 U.S. at 167 (emphasis added). Here, such a nexus plainly exists: no one denies that WCA3 constitutes "navigable waters" under the Act. Accordingly, protection of WCA3's water quality is not at the "outer limits" of the Act's constitutional reach, and there is no need to invoke a clear statement rule. To the contrary, protection of "navigable waters" is a core and legitimate concern of the Act.

Indeed, that principle was recently confirmed by the Fourth Circuit, which held that clear statement principles do not govern the United States' application of Clean Water Act point source requirements to certain wetlands. *United States v. Deaton*, 332 F.3d 698, 704-08 (4th Cir. 2003). Having determined that the wetlands were within Congress' Commerce Clause power, the court concluded that application of point source requirements

> *does not* invade an area of authority reserved to the states. The power to protect navigable waters is part of the commerce power given to Congress by the Constitution, and this power exists alongside the states' traditional police powers. "Although States have important interests in regulating . . . natural resources within their borders, this authority is *shared with the Federal Government* when the Federal Government exercises one of its enumerated powers. . . . " *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 204, 143 L. Ed. 2d 270, 119 S. Ct. 1187 (1999).

Id. 707-08 (emphasis added). In short, application of point source requirements to navigable waters "does *not* invoke the outer limits of Congress's power or alter the federal-state framework," and thus "does *not* present a serious constitutional question that would cause us to assume that Congress did not intend to authorize the regulation." *Id.* 708 (emphasis added).

The Activities at Issue. While not disputing that the *waters* at issue are well within the Commerce Clause, petitioner erroneously argues that some subset of *activities* affecting those waters – specifically, those involving "water management and allocation" – should be singled out and subjected to federalism-driven clear statement principles. Pet. Br. 35.

First, the circumstances of this case belie the contention that it only addresses "concern[s] of *the States*." *See* Pet. Br. 35 (emphasis added). The *Corps of Engineers* built the facilities at issue here (the S-9 pump, C-11 canal, and the L-33 and L-37 levees) pursuant to *federal* statute; those facilities are governed by planning requirements established by the *Secretary of the Army* pursuant to *federal* statute; and huge sums of *federal* funds are being spent in the process. Pet. App. 3a; U.S. Br. 7-9. These are not tenable circumstances for an argument that point source regulation would intrude into matters of purely state or local interest.

Nor can the applicability of clear statement canons hinge on whether petitioner believes the activity at issue to be "traditional." *See* Pet. Br. 35. Aside from the obvious implausibility of positing a "tradition" of modern technologies (in this case, huge mechanized pumps), our environmental statutes would be eviscerated if "traditional" activities were insulated from regulation. After all, piping

untreated sewage and industrial effluent into rivers was "traditional" before passage of the Act, but petitioner does not argue that federalism concerns are implicated by regulating those practices.

Finally, it is crucial to remember that the waters at issue here – unlike *SWANCC*'s abandoned sand and gravel pit – are undisputedly a legitimate object of federal protection. The notion that some activities injurious to those waters should be singled out for a federalism-driven clear statement rule is meritless.

Thus in *Deaton*, the Fourth Circuit noted *SWANCC*'s observation that "Congress enacted the Clean Water Act under 'its traditional jurisdiction over waters that were or had been navigable in fact or which could reasonably be so made,'" 332 F.3d at 706 (quoting *SWANCC*, 531 U.S. at 172), and found that "[t]he power over navigable waters is an aspect of the authority to regulate the channels of interstate commerce." This is significant, because "Congress's power over the channels of interstate commerce, unlike its power to regulate activities with a substantial relation to interstate commerce, reaches beyond the regulation of activities that are purely economic in nature." *Id.* In particular, "the authority of Congress to keep the channels of interstate commerce free from *immoral and injurious uses* has been frequently sustained." *Id.* (emphasis added) (quoting *Caminetti v. United States*, 242 U.S. 470, 491 (1917)).

Applying that principle to the Clean Water Act, the Fourth Circuit found a federalism-driven clear statement rule unwarranted. In particular, "Gongress's authority over the channels of commerce is . . . broad enough to allow it to legislate, as it did in the Clean Water Act, to prevent the use of navigable waters *for injurious purposes*." *Id.*

707 (emphasis added). The injurious purposes addressed by the Act encompass "degrad[ation of] the *quality* of the navigable waters." *Id.* (emphasis added).

It is undisputed that the activity at issue here – pumping phosphorus-laden water into navigable water that serves as a natural conservation area – is injurious to the Act's core water quality goals. Pet. Br. 13 ("Urban and agricultural development has introduced pollutants into the ecosystem at rates that cannot be assimilated. The resulting imbalance of the ecosystem is manifest in declined faunal populations and an increase in invasive flora."). Thus, application of point source requirements to that activity does not "invoke[] the outer limits" of Congress' power, *see SWANCC*, 531 U.S. at 172, and federalism-driven clear statement principles do not apply.

Indeed, invocation of federalism principles here would reduce them to a caricature. Surely the applicability of constitutionally driven clear statement canons cannot turn on such details as whether phosphorus is piped into WCA3 from other United States waters or from a source outside of those waters. *See* Pet. Br. 31-32. In either case, waters of the United States – in whose protection there is a legitimate federal interest – are degraded.

The Program at Issue. Petitioner's federalism argument relies heavily on CWA § 101(b)'s "policy" of preserving state prerogatives. As initial matter, petitioner errs in suggesting that a *policy* can shunt aside the Act's *substantive* point source provisions. *See, e.g., New York v. FERC*, 535 U.S. 1, 22 (2002) (federalism savings clause in Federal Power Act is "a mere policy declaration that cannot nullify a clear and specific grant of jurisdiction, even if the particular grant seems inconsistent with the broadly

expressed purpose") (citation and internal quotations omitted).[7]

Moreover, if the Act's policies are to guide interpretation, petitioner fails to explain why the Act's central objective to restore and maintain the integrity of United States waters (§ 101(a)) should not carry the day. *See, e.g., Chao v. Mallard Bay Drilling*, 534 U.S. 235, 245 n.9 (2002) (rejecting interpretation that would narrow a regulatory statute's protective reach: "Such large gaps in the regulation of occupational health and safety would be plainly inconsistent with the purpose of the OSH Act."); *US Airways v. Barnett*, 535 U.S. 391, 397 (2002) (rejecting reading under which statutory provision "could not accomplish its intended objective"); *Norfolk & Western Rwy. Co. v. Ayers*, 538 U.S. 135, 123 S. Ct. 1210, 1225, 1228 (2003) (rejecting reading "inconsistent with the Act's overall recovery facilitating thrust" in favor of one that "accords with the [Act]'s overarching purpose").

But even if the Act's federalism policy were accorded substantive effect, application of point source permitting requirements is fully consistent with it. In multiple ways, Congress built a prominent state role into the Act's point source program.

First, Congress expressly provided that states can assume authority to implement the NPDES program, § 402(b) and (c) – as indeed Florida and 44 other states

[7] Likewise, the § 101(g) provision addressing allocation of "quantities" of water is expressly presented as a "policy" – and in any event does not control this case, which involves application of NPDES requirements to protect water *quality*. *See PUD*, 511 U.S. at 720-721.

have done.[8] The authors of the 1972 Act stressed that "permits granted by States under section 402 are *not* Federal permits – but *State* permits." H.R. Rep. No. 911, 92d Cong., 2d Sess. 127 (1972) (emphasis added).

Congress' decision to allow delegations of § 402 authority to states is no mere incidental feature of the 1972 Act, but is integral to Congress's intent. Indeed, § 101(b) – the very provision relied on by petitioner – confirms "the policy of Congress that *the States* . . . implement the permit programs under sections 1342 and 1344 [§§ 402 and 404]." (Emphasis added.)

Significantly, when the 1972 Amendments were enacted, the Corps was beginning to implement an expanded *federal* permitting program under the 1899 Refuse Act. The legislative history expresses Congress' intent that the federal-state balance be restored by allowing *states* to administer the Act's discharge permitting program. *See, e.g.*, 1972 House Rep. at 125 (criticizing the Refuse Act's "total usurpation of enforcement of water quality control by the Federal Government" as "inconsistent with the Federal-State partnership that is necessary if we are ever to have clean and safe waters"; instead, "[t]he role of the States must be clearly recognized"). *See also* S. Rep. 414, 92d Cong., 1st Sess. 70-72 (1971); 117 Cong. Rec. 38798 (Nov. 2, 1971) (Sen. Muskie); *id.* 38808 (Sen. Montoya); 118 Cong. Rec. 10662 (March 28, 1972) (Cong. Roe).

Not only are states permit *issuers*, they also serve a key role in establishing the *content* of permits – both

[8] *See* http://cfpub.epa.gov/npdes/statestats.cfm. Section 404 likewise allows delegation of dredge-and-fill permitting authority to states. § 404(g) and (l). *See Minnehaha*, 597 F.2d at 627.

water-quality based and technology-based. First, in contrast to the *federal* air quality standards mandated two years previously by the 1970 Clean Air Act, *see Train v. Natural Resources Defense Council*, 421 U.S. 60, 64-65 (1975), the authors of the 1972 Water Act opted for *state* water quality standards. § 303(a)-(c). To meet these state standards, Congress provided for *state* pollution caps ("total maximum daily loads"). § 303(d).

As for technology-based requirements, the Act does provide for national standards – but has built-in flexibility in the form of feasibility tests. *See, e.g.*, §§ 301(b), 304(b), 306(a)(1). Moreover, for categories like diversions, for which national standards have not been promulgated, technology-based requirements are set on a *case-by-case basis* by the permit writer – which, in Florida and the other 44 delegated states, is the *state*. *See* 40 C.F.R. §§ 122.44(a)(1), 125.3(c)(2); *Milwaukee v. Illinois*, 451 U.S. 304, 324 (1981) (where "EPA ha[d] not promulgated regulations mandating specific control guidelines [for sewer overflows] because of a recognition that the problem is '*site specific*,'" Court noted that "[d]ecision is made on a *case-by-case* basis, through the *permit* procedure.") (emphasis added).

Thus, *state agencies* issue *state* permits, applying *state* judgments about technology-based requirements and implementing *state* water quality standards and *state* TMDLs. Moreover, *state* courts review these permits. 40 C.F.R. § 123.30. Given the pervasiveness with which Congress designed a state role into the very core of the point source program, there is no valid basis for using federalism principles to shunt that program aside.

In short, the present case is not appropriate for federalism-driven clear statement rules, instead presenting a

normal statutory interpretation issue. *See, e.g., Egelhoff v. Egelhoff*, 532 U.S. 141, 151 n.4 (2001) (rejecting suggestion that "the resolution of this case depends on one's view of federalism;" instead, "we are called upon merely to interpret ERISA"). *Accord, United States v. Oakland Cannabis Buyers' Cooperative*, 532 U.S. 483, 494 n.7 (2001).

B. Exempting S-9's Pumping of Phosphorus-Laden Stormwater From Point Source Requirements Would Produce Absurd Results.

Petitioner claims that applying point source requirements to S-9 would produce "absurd" and "disastrous" results. Pet. Br. 37-45. To the contrary, *exempting* S-9 from those requirements would be absurd.

While petitioner, the United States, and other amici spill much ink discussing *other* fact patterns they fear might be swept into the Act's point source requirements, this case is about one facility only: S-9. According to the United States itself, the question whether there has been a discharge "depend[s] on the facts *of the particular case*." U.S. Br. 24 (emphasis added). *This* particular case strongly counsels application of point source requirements – and differs substantially from other hypotheticals posed by petitioner and its allies.

Significantly, this case does not involve the "textbook examples of nonpoint sources" – *i.e.*, "various forms of runoff, which reach waterbodies by *flowing* over or *percolating* through *topographical features*." U.S. Br. 5 n.1 (emphasis added). Nor does it involve a facility like a dam, which passes water along a course it would have followed naturally – *i.e.*, from upstream to downstream. Finally, it

does not involve a practice lacking significant adverse water quality impacts.

To the contrary, at issue here is a highly human-controlled system under which phosphorus-laden runoff is *collected* in human-made *conveyances*, and then *pumped* several feet *uphill* into another waterbody – causing serious *degradation* of water quality. Under these circumstances, it would be absurd *not* to apply the Act's point source requirements, whose very essence is to regulate the "conveyance" of pollutants to protect the integrity of United States waters. §§ 502(14), 101(a). Indeed, "Congress' intent in enacting the [1972] Amendments was clearly to establish an *all-encompassing* program of water pollution regulation," under which *"[e]very* point source discharge is prohibited unless covered by a permit." *Milwaukee*, 451 U.S. at 318 (emphasis in original; footnote omitted).

Because S-9 is already subject to permitting under Florida law, *see* Pet. Br. 17, petitioner cannot credibly argue that applying a permit requirement to S-9 is in itself absurd. Instead, petitioner argues that the specific requirements associated with the NPDES program – especially its technology-based requirements – were intended to apply only to flows that are "continuous and of known quantity," Pet. Br. 39-40, and to the "original sources" of pollutants rather than those who convey them. Pet. Br. 42-43. *See also* U.S. Br. 27. This argument flies in the face of the Act, which expressly confirms applicability of point source requirements to stormwater and combined sewer overflows, § 402(p)-(q) – both of which involve irregular

flows with varying pollutant loads that do not originate with the discharging entity.[9]

Petitioner also claims that NPDES would interfere with other ongoing programs to protect water quality. Pet. Br. 40-42. To the contrary, the NPDES program would foster compliance with water quality standards, *see* p. 26, *supra*, thus serving one of the Act's "central objectives." *Arkansas v. Oklahoma*, 503 U.S. 91, 106 (1992). The content of the permit would be established by Florida, applying the state's judgments concerning both water-quality-based and technology-based requirements. *See* pp. 24-26, *supra*. The United States itself argues that the NPDES program has "considerable flexibility," that its burdens "may be relatively modest," and that it "may be reconcilable with, and integrated into," other ongoing water quality efforts. U.S. Cert. Opp. 17-18. In short, three decades after passage of the 1972 Act, and two decades after the date by which Congress intended United States waters to be fishable and swimmable, § 101(a)(2), there is nothing "absurd" or "disastrous" about protecting Florida's navigable waters through the sensible accountability and oversight associated with the NPDES program.

C. The Rule of Lenity Offers No Basis for Narrowing the Reach of the Act's Point Source Provisions.

The rule of lenity cited by petitioner applies only where a statute is *ambiguous* on the issue at hand.

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[9] *See* U.S. Br. 22 n.6; *Milwaukee*, 451 U.S. at 324; http://www.cfpub2.epa.gov/npdes/wetweather.cfm; http://www.cfpub2.epa.gov/npdes/home.cfm?program_id=5.

United States v. Thompson/Center Arms Company, 504 U.S. 505, 517-18 (1992). On the issue cited by petitioner's rule-of-lenity discussion – namely, whether pollutants have to "originate from the point source" (Pet. Br. 45) – the Act is not at all ambiguous. *See* U.S. Br. 22 n.6 (discussing the Act's express provisions for permitting of sewage treatment plants and stormwater systems).

CONCLUSION

The judgment of the Eleventh Circuit should be affirmed.

Respectfully submitted,

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